U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter Of:	:	
ANTHONY SANTIAGO	:	
Complainant,	:	
v.	:	CASE No.: 2009-FRS-00011
METRO-NORTH COMMUTER RAILROAD CO., INC.,	:	
Respondent.	:	

POST-TRIAL BRIEF OF THE ASSISTANT SECRETARY

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I. STATEMENT OF FACTS

A. FACTUAL BACKGROUND

Anthony Santiago is an employee of Metro-North Commuter Railroad Co., Inc. (hereinafter "Metro-North"), a suburban commuter rail service that runs service to New York and Connecticut, as well as parts of New Jersey. Mr. Santiago began work for Metro-North in October 2005 as an electrician out of Metro-North's shop in Brewster, New York (T. 50, 54-55).

On July 25, 2008, Mr. Santiago was injured on the job when he sat in a chair that, unbeknownst to him, was broken and gave way upon contact, sending Mr. Santiago crashing to the floor (T. 57-59; Santiago Exs. 2-5). As a result of the fall, Mr. Santiago sustained an injury to his lower back (T. 59-60, 65; Santiago Exs. 2, 10-11). Because he was injured at work, Metro-North policy required Mr. Santiago to report to Metro-North's medical department, known as Occupational Health Services ("OHS") (T. 63; Santiago Ex. 9). Mr. Santiago reported to OHS in the morning of July 25, 2008, following his release from Putnam Hospital (T. 63). At

OHS, Mr. Santiago met with physician assistant John Ella (T. 63-64; Santiago Ex. 10). Because the injury occurred at work, there was no question that Mr. Santiago's injury should be classified as an occupational injury at that time (T. 296-98; Santiago Exs. 11-12). Ella recorded Mr. Santiago's injury as a back strain/sprain; per the Office of Disability Guidelines ("ODG") and/or American College of Occupational and Environmental Medicine ("ACOEM"), two industry guidelines on which he regularly relies to determine "how long [an injury] is expected to heal," a back sprain/strain should heal after four to six weeks (T. 297-98, 374; Santiago Exs. 11-12).

But Mr. Santiago's occupational injury did not clear up in four to six weeks. A month after the accident, Mr. Santiago was still experiencing "a constant deep dull ache" that radiated "into the buttocks and both legs to the knee" as well as "pins and needles in each foot" (T. 72-73; Santiago Ex. 22). Beginning in late August 2008, at the recommendation of an orthopedist, and with the permission of Ella, Mr. Santiago began regular chiropractic treatment with Dr. Thomas Drag, a licensed chiropractor, to address the persisting back pain (T. 67-68, 71-72; Santiago Exs. 17, 21). Consistent with the ODG/ACOEM guidelines, Ella approved an initial round of 18 chiropractic visits between August 23, 2008 and October 10, 2008—for a total of six weeks of treatment (Santiago Ex. 25, 32). But at the six week mark, Dr. Drag reported to OHS that Mr. Santiago had made only "minimal improvement" and requested approval for six more weeks of chiropractic treatment as well as a MRI (Santiago Exs. 29, 34).

Throughout Mr. Santiago's chiropractic treatment, Dr. Drag regularly sent reports about Mr. Santiago's progress to Ella at OHS, who concurrently met with Mr. Santiago to monitor his treatment (See, e.g., Santiago Exs. 22, 26, 27). On each of Mr. Santiago's four visits to OHS, including his last visit with Ella at OHS on October 10, 2008, Ella classified Mr. Santiago's injury as "occupational" (T. 65, 70, 76, 306; Santiago Exs. 12, 20, 33). And, in accordance with

federal law, Metro-North paid for 100% of the medical care associated with Mr. Santiago's injury[1] (Santiago Exs. 16, 25, 30). That is, Metro-North paid for the cost of his injury until Ella changed the injury classification to "non-occupational" (T. 86).

On October 27, 2008, the same day Ella reviewed the results of Mr. Santiago's MRI showing signs of a herniated disc, Ella issued a "letter of denial" to Dr. Drag, denying a pending request for further chiropractic treatment (T. 286; Santiago Exs. 34, 37). "Mr. Santiago's case concerning his back problem is considered resolved," Ella explained to Dr. Drag a mere 12 days after Dr. Drag had informed OHS that Mr. Santiago had only made minimal improvement and would need further treatment (Santiago Exs. 34). Ella informed Dr. Drag that he would now have to "submit all office visits and procedures charges after 10/10/08 to [Mr. Santiago's] private medical insurance" (Santiago Ex. 37). The significance of this letter, Ella explained at trial, was for Metro-North to communicate its belief that Mr. Santiago's injury was now attributable to a non-occupational incident, or in other words, was not related to his employment (T. 276; see also T. 193-94).

Dr. Drag objected to Metro-North's opinion that Mr. Santiago's back injury had resolved by phone and in writing to no avail (Santiago Ex. 38). Dr. Lynne Hildebrand, Medical Director of OHS, and its only doctor, affirmed Ella's decision on November 14, 2008 based on a review of Mr. Santiago's file (T. 354-55, 358; Santiago Ex. 39). Ten days later, on November 24, 2008, Metro-North Administrator for OHS, Angela Pitaro, met with Mr. Santiago in person at the OHS clinic to confirm that the Metro-North decision to deny payment for further care was final (T. 81-82; Santiago Ex. 40). On this date, for the first time since Mr. Santiago presented to OHS,

[1] See Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. ("Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.")

Metro-North filled out a form MD-40 noting that Mr. Santiago's injury was "non-occupational" (T. 83; Santiago Ex. 41). At no time throughout Metro-North's decision-making process did anyone at Metro-North OHS consult with or attempt to consult with Dr. Drag about his contrary opinion, namely that Mr. Santiago's injury remained attributable to his July 25, 2008 occupational injury (T. 287, 354-55).

Still experiencing quite a bit of back pain at this point in time, Mr. Santiago continued to see Dr. Drag throughout the fall and winter of 2008 and into 2009 regardless of Metro-North's decision to end payment for his medical care (T. 151, 155-60; Santiago Exs. 43, 43A). In March 2009, five months after Dr. Drag recommended it, Mr. Santiago underwent a three-day manipulation under anesthesia ("MUA") (T. 84). The treatment, although five months delayed, was successful (T. 84-85). In Mr. Santiago's own words: "It help[ed] a lot" (T. 85). But the treatment was also very expensive. Because Dr. Drag is not a participating physician with Mr. Santiago's private medical insurance policy, and because his private medical insurance did not approve the MUA, Mr. Santiago had to pay out-of-pocket over $16,000 for the care related to his occupational injury (T. 83-84, 87-92; Santiago Exs. 43, 43A). Mr. Santiago did not have the money. In order to pay for the medical treatment, Mr. Santiago took out a loan, which he did by way of a special credit card that is interest-free through March 2010, and has an interest rate of 22.9% for any missed payments (T. 95-96; Santiago Ex. 45). After that card expires, Mr. Santiago will "have to renew or look for another method to pay [his] expenses" (T. 96).

The three days during which Mr. Santiago underwent the MUA were the only three days of work he missed due to his occupational injury (T. 85-86). Mr. Santiago elected to take those three days as FMLA (Family Medical Leave Act) leave (T. 130). The reason Mr. Santiago kept going to work despite his pain and the reason he elected to take FMLA leave was to avoid having

a negative attendance record (T. 86). In his own words: "I was afraid to [take time off]. Because if I take a sick day, it will count as an absentee. There's no—it counts as an absent. . . . [T]here is a rule that if you have a certain [sic] absent days they start sending letters and having disciplinary actions" (T. 86). Looking back, Mr. Santiago stated: "I would never report [an injury again]. . . . You have to go through all of this [sic] procedures and . . . if I know my treatment will be put [sic] in the middle of the treatment, I never go this way" (T. 108).

B. PROCEDURAL HISTORY

Mr. Santiago filed a whistleblower complaint with the Occupational Safety and Health Administration ("OSHA") on December 29, 2008, alleging that his employer, Metro-North Commuter Railroad Co., Inc. (A) unlawfully discriminated against him for reporting a personal work-related injury in violation 49 U.S.C. § 20109(a)(4) and (B) delayed, denied and/or interfered with his medical treatment in violation of 49 U.S.C. § 20109(c)(1). OSHA conducted an investigation of Mr. Santiago's complaint and issued a determination that his complaint had merit. The Secretary ordered compensatory damages as well as $75,000 in punitive damages as well as non-monetary remedies. Metro-North objected to OSHA's merit findings and thereby initiated this proceeding (29 CFR 1979.106(a)).[2] OSHA intervened as an interested party in July of 2009.

On September 29, 2009, Metro-North moved for summary dismissal of Mr. Santiago's claims. See Motion for Summary Decision with Respect to Complainant Anthony Santiago, dated Sept. 29, 2009. This Court denied summary disposition on November 9, 2009. See Order Denying Respondent's Motion for Summary Decision with Respect to Complainant Anthony

[2] Mr. Santiago's case was originally consolidated with three other FRSA complaints against Metro-North: Barati v. Metro-North Commuter Railroad Co., Inc. (2009-FRS-00010); Ellis v. Metro-North Commuter Railroad Co., Inc. (2009-FRS-00012); and Tagliatela v. Metro-North Commuter Railroad Co., Inc. (2009-FRS-00013). On November 12, 2009, this Court severed Mr. Santiago's case from those three cases. See Order Staying Proceedings in Barati, Ellis and Tagliatela and Severing Santiago Claim, dated Nov. 12, 2009.

Santiago, dated November 9, 2009 ("Summary Judgment Order"). In brief, this Court held that changing the classification of an injury occurring at the workplace to a non-occupational injury may rise to the level of "interference with medical treatment," but found that there were genuine issues of material fact in dispute as to whether (1) Metro-North's reclassification would deter a similarly situated employee from reporting a safety concern or a work-related injury and (2) the decision to change the classification was motivated or contributed to by the Complainant's protected activity. See Summary Judgment Order at 4-6. A hearing was held from November 17, 2009 to November 19, 2009 to resolve those disputed facts.

II. SUMMARY OF THE ARGUMENT

This case arises under the 2007 amendments to the employee protections of the Federal Railroad Safety Act, 49 U.S.C. § 20109 ("the FRSA" or "FRSA"). In this action we advance an interpretation of 49 U.S.C. § 20109(a)(4) that is intended to carry out the will of Congress, namely the improvement of rail safety through the full and accurate collection of data about rail accidents, injuries, and illnesses. To effectuate this Congressional goal, we read 49 U.S.C. § 20109(a)(4) liberally to give broad meaning to the words "in any other way discriminate" contained in section (a)(4); consistent with the Congressional purpose of 49 U.S.C. § 20109(a)(4), these words should be construed to encompass behavior, like Metro-North's conduct here—reclassifying Mr. Santiago's occupational injury as non-occupational—which deters employees from reporting work-related personal injuries and manipulates safety statistics.

Metro-North's actions go precisely where Congress prohibited the railroads from going: between the employee injured at work and his or her treating doctor. The reclassification by the railroad of occupational injuries as non-occupational, without medical basis, and in

contravention of an employee's treating physician, is a form of intimidation and harassment recognized by Congress.

Under this reading of the statute, not only do Metro-North's actions constitute a violation of the whistleblower protection under FRSA; the severity of those actions makes punitive damages appropriate. The overwhelming evidence at trial shows that Metro-North's medical department did more than substitute the judgment of its doctor over that of Mr. Santiago's treating physician; worse still, Metro-North consistently imposed the willfully uninformed decisions of an unsupervised physician assistant over the medically sound treatment of a licensed chiropractor. It did so knowing full well that (1) Mr. Santiago remained injured and in need of further treatment and (2) that its decision to reclassify would immediately end its financial obligation to cover any continued treatment *but without* knowledge of whether any other source would continue to support his treatment.

III. ARGUMENT

A. THE FRSA DIVESTS RAIL CARRIERS OF THE AUTHORITY TO RECLASSIFY AN OCCUPATIONAL INJURY AS NON-OCCUPATIONAL IN CONTRAVENTION OF THE TREATING PHYSICIAN'S CONCLUSION TO THE CONTRARY.

The 2007 and 2008 amendments to the FRSA should be read as a unified remedial scheme addressing the chronic underreporting of workplace accidents occurring on the railroad. The text and legislative history, liberally construed, see generally Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980), evince a broad prohibition of railroad policies and procedures that subtly and overtly interfere with rail employees' right to report work-related personal injuries and illnesses.[3]

[3] In relevant part, the 2007 amendments to section (a) of the FRSA also (1) expanded FRSA liability to contractors, subcontractors and officers and employees of the rail carrier; and (2) expanded the general employee protections to include, inter alia: "provid[ing] information . . . or otherwise assist[ing] in any investigation [of certain conduct]" by government regulatory or law enforcement agencies, a Member of Congress or a person with supervisory authority; "refus[ing] to violate . . . a federal law, rule, or regulation relating to railroad safety or security;" "cooperat[ing] with

Critically, our interpretation of section (a)(4) is informed by the language and legislative history of 49 U.S.C. § 20109(c). In section (a)(4) Congress framed the contours of a new employee protection—the right to report an injury—in general terms. And through section (c) Congress gave that protection further meaning by prohibiting specific railroad conduct legislatively found[4] to discourage the exercise of that right. Section (c)(1) illuminates what Congress meant by the words "in any other way discriminate" included in section (a)(4). This interpretation of 49 U.S.C. § 20109(a)(4) fully effectuates the Congressional purpose of the amended legislation, and is entitled to appropriate deference in accordance with Skidmore v. Swift & Co., 323 U.S. 134 (1944).

1. In order to give full force and effect to the purpose of the FRSA, the right to report an injury provided in 49 U.S.C. § 20109(a)(4) must be read to protect the full and accurate reporting of a work-related personal injury or illness including the number of lost work days.

Title 49 U.S.C. § 20109(a)(4) provides that (emphasis added):

> [a] railroad carrier engaged in interstate or foreign commerce, a contractor or subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, *or in any other way discriminate against* an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done. . . . to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee[.]

On its face, 49 U.S.C. § 20109(a)(4) evinces a very specific purpose: to ensure the accurate reporting of workplace accident and illness statistics—the incidence of those injuries and the

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a safety or security investigation by" or "furnishing [certain] information" to the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; and "to accurately report hours on duty . . . ."

[4] We assert that section (c) provides guidance in the interpretation of section (a)(4). Our construction of section (a)(4), which we are charged with enforcing, is permissibly enhanced by the statutory provision in section (c). For example, both courts and federal regulatory agencies have interpreted enforcement provisions as providing an insight into the legislative intent. See, e.g., Whirlpool, 445 U.S. 1; 29 U.S.C.654 (a)(1).

severity thereof—to government regulators. More broadly speaking, the premise of section (a)(4) is to promote safety on the railroad. All of the rights guaranteed in sub-section (a) share this goal. To accomplish this goal, the legislation's remedial orientation is prophylactic in nature. Each sub-section in 49 U.S.C. § 20109(a) aims to keep the railway safe by protecting a specific communication between employees and investigative agencies/individuals in the hope that these protections will foster the collection and categorization of safety data in order to (1) understand how and why accidents occur and thus, (2) to identify and reduce risks before accidents happen. Like many other remedial safety statutes, the FRSA recognizes the importance of employee cooperation in the achievement of the government's safety agenda. In the same way that protecting workers' right to cooperate in a safety investigation helps the government monitor the railroad's compliance with federal safety laws, protecting rail workers' right to report a work-related injury helps the government enforce a railroad's FRA (Federal Railroad Administration) reporting obligations.

Significantly, the reporting obligations 49 U.S.C. § 20109(a)(4) reinforces require not only that the railroad report to the FRA the occurrence of an accident, but also the severity of each injury resulting there from (i.e. number of lost work days).[5] The text of 49 U.S.C. § 20109(a)(4) mirrors the scope of a railroad's reporting obligations; 49 U.S.C. § 20109(a)(4) is written in terms of "personal injur[ies]" and "illness[es]." In part, Congress was interested in

[5] By federal law, railroads are required to file a monthly report with the Secretary of Transportation, under oath, listing "all accidents and incidents resulting in injury or death to an individual or damage to equipment or a roadbed arising from the carrier's operations during the month." See Written Statement of Joseph H. Boardman before the Committee on Transportation and Infrastructure, U.S. House of Representatives (Oct. 25, 2007) at 4 (citing 49 U.S.C. 20901(a)). The carrier is required to describe the nature, cause, and circumstances of each accident or incident included in the report. Id. Likewise, the FRA's accident reporting regulations require that each railroad submit monthly reports to the FRA summarizing collisions, derailments, and certain other accidents and incidents involving damages above a periodically revised dollar threshold, certain injuries to passengers and other persons, as well as certain occupational injuries to and illnesses of railroad employees. Id. (citing 49 C.F.R. Part 225). The FRA reporting requirements concerning an employee injury are triggered, generally, when an event involving the operation of the railroad results in an employee dying, requiring medical treatment (beyond first aid), missing at least one day of work, being placed on restricted work activity or receiving a job transfer, or losing consciousness due to the injury. Id.

accident statistics. But this language reveals a concern that goes beyond the mere occurrence of a rail accident. This language emphasizes, and the right to report must include, the *results* of the accident. That this is what 49 U.S.C. § 20109(a)(4) means is underscored in the text of 49 U.S.C. § 20109(c): "prompt medical attention." Through 49 U.S.C. § 20109(c), Congress enumerated specific prohibitions of railroad conduct that discouraged rail employees from *reporting* injuries and in turn compromised safety.

2. Title 49 U.S.C. § 20109(c) effectuates 49 U.S.C. § 20109(a)(4) by precluding the railroad from overriding the reasonable medical decisions of the employee's treating physician.

In section 49 U.S.C. § 20109(c), Congress identified —and strictly prohibited—railroad conduct that undermines the full protection given to rail employees in 49 U.S.C. 20109(a)(4).

Specifically, under section 20109(c)(1) (emphasis added):

> [a] railroad carrier or person covered under this section **may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment.** If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

Likewise, section 20109(c)(2) provides that (emphasis added):

> [a] railroad carrier or person covered under this section **may not discipline or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or treatment plan of a treating physician**, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Rail Administration medical standards for fitness of duty or, if there are no pertinent Federal Rail Administration standards, a carrier's medical standards for fitness of duty. . . .

Reading these two provisions together, this Court concluded, that section (c) was more than just a first aid provision; as a whole, section (c) "protect[s] employees from interference with medical

care or the treatment plan of the treating physician during the course of treatment and recovery from a work injury." Summary Judgment Order at 5.

The statute precludes the railroad from directing where or when an injured worker will get medical care in the aftermath of a work-related injury. The statute is entitled "*prompt* medical attention" and expressly precludes any "delay, denial or interference" in medical or first aid treatment. And while the statute imposes on the railroad an affirmative duty to transport injured workers—if the injured employee so chooses—to get medical care, it leaves no discretion to the railroad as to whether the transportation would be to a doctor or to the emergency room or whether the transportation would be to one hospital as opposed to another. The statute mandates the *nearest* hospital where the employee can receive safe and appropriate medical care.

Further, the statute precludes the railroad from dictating the nature or extent of an injured employee's medical treatment. Generally, the railroad is strictly prohibited from "interfer[ing]" with an employee's medical treatment without regard for the cause or motive of the railroad's actions. More specifically, the orders and/or treatment plan of an employee's treating physician are not subject to question vis-à-vis disciplinary action or discharge. In other words, the statute presumes that the treating physician's orders and/or treatment plan are correct and conclusive. Under this statute, then, it is no defense that the treating physician was wrong in the eyes of the railroad's medical staff.[6]

B. THE LEGISLATIVE HISTORY OF THE FRSA SUPPORTS THIS CONSTRUCTION OF THE STATUTE.

A close examination of the legislative history surrounding the enactment of the recent FRSA amendments demonstrates that Congress intended this legislation to isolate important

[6] Significantly, the statute contemplates one potential area of disagreement between the railroad and the employee's treating physician. In relevant part, section (c)(2) provides that a railroad would not be held to violate the statute for refusing to return an employee to work, despite the opinion of the treating physician that the employee was ready for work.

decisions about injured employees' medical care in the hands of independent medical professionals or conversely, to remove any power of the railroad to use employees' medical care as an opportunity to skew safety statistics. The recent amendments to the FRSA reflect Congressional findings of widespread harassment and intimidation of injured rail workers throughout the rail industry. For at least five years before the 2007 amendments to the FRSA, both the House and the Senate examined the inadequacy of existing whistleblower protections in the FRSA and the punitive atmosphere surrounding medical care and injuries in the railroad.[7] The most recent hearings on the subject grew out of an in-depth review of railroad employee injury reporting practices undertaken by the House Committee on Transportation and Infrastructure's Oversight and Investigations staff. Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the Committee on Transportation and Infrastructure, 110th Congr. (2007) ("Impact Hearing"); see also Summary of the Subject Matter, Oversight and Investigations Majority Staff of the House Committee on Transportation and Infrastructure, 110th Congr. (Oct. 22, 2007) ("House Report"). In these hearings, Congress examined rail worker allegations that railroad safety management programs deterred workers from reporting injuries and created barriers to these workers' medical care.

Overall, the legislative record is replete with examples of abusive practices including: (1) counseling employees not to file injury reports in the first place; (2) finding employees exclusively at fault for their injuries and administering discipline; and (3) subjecting employees who have reported injury accidents to increased performance monitoring, performance testing,

[7] Railroad Safety: Hearing Before the Sub-Committee on Surface Transportation and Merchant Marine of the Committee on Commerce, Science, and Transportation, 107th Congr. 61 (2002) (S. Hrg. 107-1108); Domestic Passenger and Freight Rail Security: Hearing Before the Committee on Commerce, Science and Transportation, 109th Congress, 2005 (S. Hrg. 109-462); and Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the Committee on Transportation and Infrastructure, 110th Congr. (2007) (H. Hrg. 110-84).

and often followed by subsequent disciplinary action, including termination. House Report at 3. Congress was likewise aware of concerns expressed by the Administrator of the Federal Railroad Administration, namely that: "[h]arassment and intimidation calculated to avoid reporting of employee on-duty injuries create barriers to proper medical care. . . ." See Impact Hearing (written statement of Joseph H. Boardman, Administrator, Federal Railroad Administration) at 139-159. Congress shared Administrator Boardman's concerns: "It is not right for people on the job to be told[,] you shouldn't report this injury; maybe you can just sit here in the health room, maybe you just need an aspirin or maybe you just need a little time, and don't put this on the report because then it becomes an accident, and that looks bad for the railroad." See Impact Hearing (testimony of Hon. James Oberstar, Chairman, House Committee on Transportation and Infrastructure) at 1-2.

Congress had before it myriad reports of harassment that created barriers to medical treatment. The legislative record contains examples of supervisors (1) accompanying injured employees on their medical appointments to try to influence the type of treatment injured employees received, often having private conversations with treating doctors; (2) attempting to send employees to company physicians instead of allowing a choice of their own treatment providers; (3) prohibiting an injured employee from going to the hospital; and (4) generally putting up barriers to impede prompt and appropriate medical treatment. House Report at 5. Notably, Congress also had before it several government reports as well as the legislative history of statutes passed by the states of Minnesota and Illinois, two states whose "concern[for] the large number of reports of rail carriers denying medical treatment or interfering with medical

treatment of injured employees" led them to pass statutes outlawing the delay, denial or interference with medical treatment.[8] House Report at 9.

Critically, on this record, Congress concluded that what motivated this culture of harassment and intimidation of employees is the practical significance reporting accidents and injuries carries in the rail industry. As the above testimony from Chairman Oberstar reveals, reporting triggers government scrutiny and regulation or generally "looks bad for the railroad." See Impact Hearing (testimony of Hon. James Oberstar, Chairman) at 2. Congress also recognized that supervisory compensation systems contributed to these abusive practices, noting that management compensation is often based upon performance bonuses, at least in part, based on reportable injury statistics. See House Report at 6. Likewise, reporting could trigger significant financial obligations due to another federal statute, the Federal Employers' Liability Act ("FELA"). See Impact Hearing (testimony of Hon. James Oberstar, Chairman) at 1; see also Impact Hearing (written statement of Joseph Boardman).

More importantly, Congress concluded that the net effect of these abusive practices and procedures was to deter employees' right to report a work-related personal injury. At the very least, these management programs had "unintended consequences," namely that employees "generally perceive intimidation to the extent that those who are injured in rail incidents are often afraid to report their injuries or seek medical attention for fear of being terminated or severely disciplined." House Report at 3 (emphasis given).

The 2007 and 2008 amendments are a legislative response to this abuse. See House Report at 9 ("[The two amendments] are intended to address the above problems."). Through the amendments, Congress intended to ensure appropriate medical treatment for injured employees

[8] See generally, Ill. Public Act 094-0318; Minn. Stat. § 609.849(a)(1); FRA Draft Report on CSX Transportation Harassment and Intimidation Investigation, p. 4, Oct. 17, 2007; "FRA Needs to Correct Deficiencies in Reporting Injuries and Accidents," GAO/RCED-89-109 (Apr. 1989).

as a remedy for the underreporting of rail accidents, and the resulting injuries and illnesses. To *the government* the significance of reporting cannot be understated. According to Congressional and FRA reports leading to the amendment of 49 U.S.C. § 20109, the FRA uses its railroad safety databases as the basis for its regulatory safety planning and reporting. Because of the link between the FRA safety databases and the FRA's regulatory actions, Congress was concerned that underreporting of accidents and injuries could have significant safety repercussions. As the 2007 Congressional Report noted, "[t]he key to any safety and regulatory program is the ability to collect and categorize all incident and accident data so that safety problem areas are fully understood, identified, and addressed." House Report at 1. Underreporting "makes accident statistics look better than they really are, [and] it denies the public, it denies regulators, and it denies the Congress a full understanding of the nature and extent of safety problems in the rail industry . . . ." Impact Hearing (testimony of Hon. James Oberstar, Chairman) at 1.

Though passed roughly a year apart, this legislative history shows that the 2007 and 2008 amendments were designed as a single remedial scheme containing new rights and remedies. See House Report at 9 ("By enacting both of these provisions a uniform national standard will be created for the protection of injured workers and allow them access to immediate medical attention free from railroad interference."). Broadly speaking, the 2007 amendments to section (a)—particularly section (a)(4)—acknowledge and reinforce the connection between rail safety and the full and accurate reporting of employee injuries; the promulgation of section (c) a year later addresses prohibitions against specific railroad conduct recognized as a remaining obstacle to the protections granted in 2007. More specifically, section (c) is a legislative finding that a railroad's reversal of a physician's treatment plan effectively deprives the employee of the right

to report a work-related injury (most importantly the number of lost work days or the full scope of the injury) to the Secretary of Transportation.

Cumulatively the amendments were meant to convey a message to the railroads: stop discriminat[ing] against workers who report safety problems. The message was not whispered; it was spoken loudly and clearly: Congress underscored its intent to create a real deterrent and not just make violations a cost of doing business, by increasing the availability of punitive damages exponentially, raising the cap from $20,000 to $250,000. See 49 U.S.C. § 20109(c) (1994); 49 U.S.C. § 20109(d)(3) (2007).

C. METRO NORTH UNLAWFULLY DISCRIMINATED AGAINST MR. SANTIAGO IN VIOLATION OF THE FRSA WHEN IT CHANGED HIS INJURY CLASSIFICATION FROM OCCUPATIONAL TO NON-OCCUPATIONAL IN CONTRAVENTION OF MR. SANTIAGO'S TREATING PHYSICIAN.

As this Court noted in its Summary Judgment Order, "neither party disputes that Complainant engaged in protected activity under the FRSA when [Mr. Santiago] reported his work injury, or that Metro North was aware of the protected activity."[9] Summary Judgment Order at 3. The disputed issues for trial were "whether Metro North's action in changing the status of [Mr. Santiago's] injury from occupational to non-occupational is an unfavorable personnel action under the FRSA and whether the protected activity was a contributing factor in any such unfavorable personnel action." Id. On the facts presented at trial, there can be but one conclusion: the Court should answer both of these questions in the affirmative.

OHS is staffed primarily by two physician assistants who make important decisions about employees' medical care with little or no supervision from a licensed doctor and with little or no

[9] The whistleblower protection provision of the FRSA provides that actions under the statute are governed by the analytical framework and burdens of proof applied under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b).

regulation (T. 187, 267, 286). It is undisputed that the initial decision that Mr. Santiago's occupational injury was no longer occupational as of October 27, 2008 was made by John Ella (T. 234, 286, 315, 351). Mr. Ella is not a licensed physician (T. 265-66). He is a physician assistant (id.). Though the law requires a physician assistant to work under the supervision of a licensed physician, in this case, Mr. Ella operated entirely unsupervised by Metro-North's sole physician, Dr. Lynne Hildebrand (T. 266-67, 286-87, 351). Ella likewise testified that he generally, as this case demonstrates, operates without regard to the opinion of the employee's treating physician (T. 271; 274-75, 287). Under these circumstances, this physician assistant wields a significant amount of unbridled discretion (T. 517-18).

Ella confirmed that he did not use any internal written guidance or criteria to determine when it is appropriate to change an injury classification from occupational to non-occupational (T. 197-98, 272-73; see also 339, 508-517). On this issue, Ella testified that OHS relies on Metro-North (T. 273; see also T. 371). But both Metro-North's Vice President of Human Resources and its OHS Administrator confirm, without further explanation, that no such guidance exists (T. 197-198, 508-518). Metro-North simply leaves this decision entirely up to the medical discretion to two nominally supervised physician assistants (T. 517-18). And the staff makes this decision in a virtual vacuum of responsibility; neither Ella nor Dr. Hildebrand is subject to malpractice liability or the legal consequences of the doctor-patient relationship (T. 269, 336, 385).

Physician assistant Ella's first assessment of Mr. Santiago's injury on July 25, 2008 ignored relevant symptoms and documentation. Significantly, Ella testified that he made his decision to classify Mr. Santiago's injury as a back sprain/strain without regard to the documents in his Metro-North medical file (T. 281). Had Mr. Ella reviewed Mr. Santiago's medical file, he

would have learned that Mr. Santiago arrived to OHS on July 25, 2008 with a history of remediated back problems (T. 51-52, 284; Santiago Ex. 7). Specifically, Mr. Ella would have learned that Mr. Santiago had had surgery in 2003 for a herniated disc, that the surgery, by all medical accounts had resulted in "good decompression" of his herniated disc, and that from 2003 to the date of the accident on Metro-North premises, Mr. Santiago had been asymptomatic (T. 53, 56, 65, 281; Santiago Ex. 7).

Ella admitted that it was his usual practice to become aware of employees' pre-existing conditions (T. 279-80). And Ella acknowledged that injuries can aggravate pre-existing conditions or more specifically, Ella acknowledged that he was familiar with Mr. Santiago's precise situation: namely, "individuals who have successful herniated disk spinal surgery in the low back [can be] asymptomatic" until "some trauma happens to them [at which point] . . . they have a recurrence of their herniated disc symptoms" (T. 280). [10] But in this case, Ella failed to conduct a proper review of Mr. Santiago's medical history and furthermore, failed to recognize symptoms more consistent with a herniated disc. Ella testified that Mr. Santiago presented to OHS on that first visit with symptoms typically associated with a herniated disc than a back sprain/strain (T. 278-79). Specifically, Ella's notes from the July 25, 2008 visit contain references to pain radiating down into Mr. Santiago's legs (Tr. 282; Santiago Ex. 10). Most of the doctor's notes in the OHS file in fact show signs of pain radiating into Mr. Santiago's legs, feet and butt (T. 282-84, Santiago Exs. 18, 19, 22, 27, 29). Yet, even in the face of this initial evidence to the contrary, Ella's diagnosis reflects the less severe back strain/sprain; even in the

[10] Notably, according to the FRA Guide for Preparing Accident/Incident Reports, which federal regulations require railroads to follow, "... a case is presumed work-related if, and only if, an event or exposure in the work environment is a discernable cause of the injury or illness or a significant aggravation to a pre-existing condition. The work event or exposure need only be one of the discernable causes; it need not be the sole or predominant cause" (General Ex. 16, Ch. 6, p. 6).

face of persisting symptoms suggesting a more severe injury, Ella remained unwavering in that initial assessment.

Ella's diagnosis is based on a false premise—that Mr. Santiago's injury was a back sprain/strain and not a herniated disc—that Ella limited Mr. Santiago's expected recovery time to four to six weeks, apparently, the time the Official Disability Guidelines ("ODG") and/or the American College Of Occupational and Environmental Medicine ("ACOEM") proscribes for back sprains/strains (T. 323, 374). It is largely based on this false premise—that at the end of six weeks of chiropractic care, Metro-North decided to deny his treating physician's requests for continued treatment (T. 297-98). Ella testified that his decision to end support for Mr. Santiago's medical treatment was "confirmed" by Mr. Santiago's x-rays and his MRI (T. 314). This is because these tests showed signs of degenerative disc disease, and as Dr. Hildebrand explained on cross-examination, you do not get degenerative disc disease from falling off a chair (T. 374). Precisely. Mr. Santiago did not get degenerative disc disease from the July 25, 2008 fall; he had degenerative disc disease when he started work at Metro-North in 2005 but was cleared for duty because he was asymptomatic; that is, he was asymptomatic until his workplace accident on July 25, 2008. That should have been plainly obvious from his medical history and his symptoms. But Metro-North failed to make the minimal requisite inquiry to uncover that information and ignored symptoms that should have alerted the medical staff to the true nature of his injury.

The full extent of Mr. Santiago's injury was plainly obvious to his treating physician, Dr. Drag (Santiago Ex. 38). But Dr. Drag's opinion was not taken into consideration when Metro-North's physician assistant made his decision to terminate further support for Mr. Santiago's care (T. 287). In fact, at no time during the three and one half months that John Ella regularly met with Mr. Santiago at OHS did Ella ever contact either of Mr. Santiago's treating physicians (T.

275; 287). Ella was fully aware of Dr. Drag and Dr. Krosser and had their contact information in the OHS file (T. 274-75; Santiago Exs. 14-15, 22-23; 25-27; 29). But apparently, he did not think it prudent to consult with them. Even once Ella knew that Dr. Drag disagreed with his decision to reclassify the injury, Ella remained resolute in his decision, apparently ignoring three phone calls from Dr. Drag with respect to Mr. Santiago's condition (Santiago Ex. 38). Likewise, Dr. Hildebrand made her November 14, 2008 decision affirming Ella's initial position without consultation with Dr. Drag or Dr. Krosser[11] (T. 354-55).

Dr. Hildebrand had before her two competing positions and had no evidence that Ella had ever spoken to Dr. Drag or Dr. Krosser (T. 352). Faced with this situation—most charitably characterized as a difference of medical opinions—it is surprising that Dr. Hildebrand, herself not a chiropractor or an orthopedist but rather most familiar with family medicine, did not think it prudent to consult with the treating specialists who had been working most closely with Mr. Santiago for several months (T. 362-63, 385). In fact, Dr. Hildebrand acknowledged at trial that in other instances where she has had a difference of medical opinion, she has consulted with her peers; and in some instances, she admitted that as a result of those conversations, she had modified her position (T. 388-89). Yet, in this instance, Dr. Hildebrand stated that her own "careful review" did not include a call to either of his treating physicians (T. 354-55; Santiago Ex. 39). Without ever evaluating Mr. Santiago, she noted that she felt the case was "clear cut" (T. 355, 389). But the very fact that various doctors disagreed suggests it was in fact far from "clear cut" (T. 389). And further, the truth of the matter is that Dr. Hildebrand testified that in

[11] Metro-North's sweeping suggestion at trial that when Metro-North overrides the treating physician's treatment plan it acts within its responsibility to "evaluate the necessity and effectiveness of the treatment that they are obtaining" should be rejected (T. 295-96). In this case, Dr. Hildebrand confirmed at trial that her decision to cut-off treatment was not based on the reasonableness of Dr. Drag's suggestion that Mr. Santiago undergo an MUA (T. 380). There is nothing in the file that suggests that John Ella considered the reasonableness of the MUA either.

her current position at OHS it is generally not her practice to speak to the employee's treating doctor, regardless of her past experience (T. 338).

The factual record speaks for itself. Metro-North's decision to deny further treatment of Mr. Santiago was not, as Metro-North claims, based on sound professional judgment; the decision was willfully and grossly uninformed. Critically, Metro-North ignored Mr. Santiago's medical history, his treating physician's opinion, and the significance of persistent symptoms. Once the injury was erroneously cast as a back sprain/strain, Metro-North operated with blinders on. Both Ella and Dr. Hildebrand's actions suggests that they rely too heavily on the ODG/AOCEM. Testimony to the contrary from Ella, Hildebrand, and Pitaro[12] is undercut by the medical staff's actions in this case. Metro-North rigidly applied the ODG/AOCEM's suggested recovery period, limiting Mr. Santiago's chiropractic treatment to six weeks despite evidence that at six weeks, Mr. Santiago's symptoms persisted and his treating physician considered him occupationally injured (Santiago Exs. 32, 38). In defense of Ella's decision to reclassify Mr. Santiago's injury, Ella and Hildebrand insist that a back sprain/strain *should* resolve in four to six weeks, or maybe eight weeks at most (T. 374). Be that as it may, all evidence suggests that Mr. Santiago's back injury did not resolve after six or eight weeks of treatment (T. 80; Santiago Ex. 38). While the use of the ODG/ACOEM as *guidelines* is not objectionable, Metro-North's use of

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[12] Angela Pitaro's attempt to minimize OHS reliance on the ODG/ACOEM should be rejected as incredible.

Judge Geraghty: [I]n making that determination [to reclassify the injury], you're using these ODG and ACOEM guidelines?
Angela Pitaro: Not only the guidelines. We're first using the individual themselves. We're looking at the person, their medical, their co-morbidities, their diagnosis, the injury that happened, the medical statements that we get from the provider, the procedures that were done, what those procedures showed, what the determination is, and how they are doing as they are getting their therapy (T. 262).

Pitaro described what one would expect from a properly run medical department. Though this may be the ideal, it is not born out by the facts demonstrating what actually happened in 2008. And in fact, this holistic approach is not born out by the 2009 "enhance[ment]" to OHS procedures (T. 263). That document provides that: "[i]f employees do not attain functional recovery within the time period expected based on the best medical judgment of [sic] OHS provider and the [ODG/ACOEM], the Occupational portion of the case is considered resolved" (General Ex. 23).

them here as the definitive word on whether or not an injury has resolved in the face of evidence to the contrary is objectionable.

In this case, the railroad imposed the judgment of a non-treating doctor, Dr. Hildebrand, who is not a chiropractor or an orthopedist, whose primary experience is in family medicine, over the judgment of a treating chiropractor. Here, the treating physician, Dr. Drag, saw and treated Mr. Santiago 18 times in a six-week period. In contrast, Metro-North's physician assistant saw him on four occasions and its doctor never met him. Given this record, there can be no other conclusion: the obvious inference is that Metro-North unlawfully discriminated against Mr. Santiago in violation of 49 U.S.C. 20109(a)(4).

That Metro-North's conduct produces a chilling effect is equally supported by this record. Mr. Santiago testified at trial that his experience having reported a work-related personal injury would chill his own future willingness to report any future accidents at work: "I would never report [an injury again]. You have to go through all of this [sic] procedures and . . . if I know my treatment will be put [sic] in the middle of the treatment, I never go this way" (T. 108). A reasonable employee could easily conclude from Mr. Santiago's experience that it is better not to report the injury at all; better to go with his or her private plan from the start so as to avoid all of the problems and expenses of reporting. After all, not only will the employee's medical treatment be compromised, but the employee's safety record will reflect the accident, which will be used in bids for promotion or craft transfer (T. 407-08). By not reporting an injury at all, employees can avoid this type of discriminatory treatment.

D. METRO-NORTH IS LIABLE FOR THE UNLAWFUL ACTIONS OF ITS CONTRACTOR, TAKE CARE HEALTH SYSTEMS.

Title 49 U.S.C. § 20109 applies to a "railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of

such a railroad carrier. . . ." Metro-North does not dispute that it is a railroad carrier engaged in interstate commerce, nor does not dispute that OHS is run by a contractor, Take Care Health Systems[13] (T. 182). As such, Metro-North and OHS are both covered entities under the FRSA. Apparently, Metro-North believes (as stated for the first time at trial) it may legally distance itself from liability for the actions giving rise to Mr. Santiago's FRSA claims by casting OHS as an independent contractor (T. 31). But that effort must fail for two reasons. First, regardless of Metro-North's decision to delegate one of its core responsibilities as a rail carrier to a contractor—namely, the full reporting of railroad accidents[14]—Metro-North simply cannot contract away its *liability* for those core responsibilities. Second, all the evidence at trial belies the existence of any actual distinction between Metro-North and its medical department OHS, regardless of what legal distinction may exist. The economic reality borne out by the facts in the record suggests that Metro-North exercises a degree of managerial authority and control over OHS personnel that is plainly indicative of the employer-employee relationship.

Metro-North pays Take Care Health Systems just over $1.5 million dollars annually to operate the OHS (T. 516). By the very terms of its contract for occupational health services, Take Care Health Systems cannot be considered truly independent from Metro-North. As an initial matter, the contract repeatedly refers to a "Consultant" (see, e.g., General Ex. 8, p. 6, 33-40). Moreover, Metro-North and only Metro-North has the right "to terminate the Contract, in whole or in part, at any time for any reason, irrespective of whether the Consultant is in default," simply "by giving the Consultant written notice to such effect" (Tr. 184-85, 509; General Ex. 8,

[13] In 2008, a company named CHD Meridian was the contractor who performed the Metro-North OHS services (T. 182-83). As a result of a merger, the entity that provides those services is called Take Care Health. Take Care Health operates under the same contractual terms that bound CH Meridian (id.).

[14] Metro-North's Chief Safety & Security Officer, Mark Campbell testified that, "[i]n terms of FRA reportability of lost work days[,] he relied "on OHS to make a determination that from a medical point of view the injury is no longer considered being occupational" and "stop[ped] counting the lost days" based on that decision (T. 418).

p. 36). Further, significant employment decisions, such as the hiring and firing of OHS personnel, is subject to Metro-North approval: Metro-North may "prohibit any Consultant personnel from working on the Contract. . . ." and OHS cannot "remove any personnel previously approved by [Metro-North] without the prior written approval of [Metro-North]" (Tr. 184-86, 509-510; General Ex. 8, pp. 36-39). Metro-North has the sole discretion to change the location of OHS as well (General Ex. 9, p. 1).

The degree of contractual control over OHS that Metro-North exercises is reinforced by the daily presence of a Metro-North employee at the OHS clinic to oversee the operations of OHS. The so-called "Scope of Work" document within the Joint Contract provides for an Administrator of Occupational Health Services and specifies a Metro-North employee shall maintain this position (General Ex. 9, p. 7). The Administrator's primary responsibilities include, but are not limited to: (1) "[m]anaging the terms and conditions of the finalized contract; (2) [d]eveloping and implementing procedures, guidelines and goals for the contractor employees; (3) [a]cting as a liaison between the contractor employees and Metro-North; and (4) [d]efining the roles and decision-making parameters of the contractor employees." Angela Pitaro is the Administrator for OHS (T. 181). Tellingly, at trial, she characterized herself as "the face of Metro-North" at the OHS clinic, testifying that she "make[s] sure that what is done within the department of OHS follows the guidelines of what's expected;" or in other words, she "let[s] them know what [she] would like to have performed" (T. 183-84; 208).

OHS employees likewise testified that they "rely on [Angela Pitaro] to inform [them] or direct [them] about Metro-North policies and procedures" because "she's the [person] most familiar with the Metro-North policies that may apply . . . to OHS" (T. 273). Notably, with respect to the actions giving rise to Mr. Santiago's FRSA claims the evidence again suggests a

seamlessness between Metro-North and OHS. It was Angela Pitaro, not Dr. Hildebrand or John Ella, and not their supervisor at Take Care Health Systems that met with Mr. Santiago on November 24, 2008 to inform him that Metro-North considered his case "resolved" and give him the letter of denial drafted by Dr. Hildebrand (T. 81; 207-08). This conduct belies the assertion of any independent relationship.

The day-to-day reality of OHS's operations is further telling with respect to the relationship between Metro-North and OHS. The OHS clinic is located next door to Metro-North's corporate building in the Graybar Building (T. 182). Indeed, Ms. Pitaro's office is located in the OHS clinic, not at Metro-North (T. 255). She has day-to-day interactions with OHS employees (T. 255; 267-68). In fact, both Ms. Pitaro and her boss, Vice President of Metro-North's Human Resources, Greg Bradley, refer to OHS personnel as "our staff" and both he and Ms. Pitaro describe staff meetings with OHS personnel where they, among other things, discuss new laws like the FRSA (T. 212, 504, 536-38). Frequently, the word "department" is used to refer to OHS, re-enforcing the notion that OHS is but a part of the greater whole, much like the safety department or the tracks department (T. 181, 183, 504, 507). Medical forms used for employee medical exams carry both the Metro-North and CHD Meridian/Take Care Health Systems logos (see, e.g., Santiago Exs. 11-12, 16, 20, 33, 41). So too do the letters denying and approving treatment (see, e.g., Santiago Exs. 25, 30, 32, 37, 39). Tellingly, the letters of denial are signed by "PA John Ella, Physician Assistant MNRR/Take Care Health Systems" and "Lynne Hildebrand, M.D. MNRR/Take Care Health Systems" (Santiago Exs. 37, 39) (emphasis added).

Finally, that John Ella and Dr. Hildebrand have been consistently represented by Metro-North counsel throughout the OSHA investigation of Mr. Santiago's FRSA claim as well as

throughout the litigation of this matter further suggests that they are part of Metro-North's "staff" and underscores the true nature of the relationship between Metro-North and OHS (T. 267, 336).

It appears that the only fact supporting the purported independence is the fact that Take Care Health pays the salaries of the OHS personnel (T. 215-16, 293-94, 367). But that fact alone does not provide Metro-North with the basis to deny liability for the actions of its medical personnel.

E. PUNITIVE DAMAGES ARE WARRANTED BASED ON THE TOTALITY OF THE CIRCUMSTANCES.

In 2007, Congress increased the availability of punitive damages under the FRSA exponentially, from $20,000 to $250,000. See 49 U.S.C. § 20109(c) (1994); 49 U.S.C. § 20109(d)(3) (2007); 49 U.S.C. § 20109(e)(3) (2008). This Court confirmed that punitive damages are available against Metro-North "if warranted by the specific facts presented." See Order Granting Complainants' Motion to Compel Discovery, dated Oct. 27, 2009 at 12 ("Punitive Damages Order"). Though it has not yet been established when punitive damages are warranted under the FRSA[15], this Court concluded in its Punitive Damages Order that, "in determining whether punitive damages are warranted, one must evaluate the totality of the circumstances surrounding the claim." Punitive Damages Order at 13. Here, the totality of the circumstances lead to only one conclusion: punitive damages are necessary to deter the continued intimidation and harassment of Metro-North employees who report and seek medical treatment for on-the-job injuries.

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[15] As a general matter, punitive damages are intended to punish wrongdoing and prevent such conduct in the future. Cooper Indust., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001). In other whistleblower statutes that provide for exemplary damages, courts have held that "exemplary damages should only be awarded when necessary to punish and deter the respondent's reprehensible conduct . . . ." and that "respondent's state of mind should be analyzed to determine whether the respondent acted with reckless disregard for the complainant's rights and then whether the respondent engaged in conscious action in deliberate disregard of those rights." Michael Collins v. Village of Lynchburg, 2006-SDW-3, slip. op. at 17 (ALJ May 8, 2007) (internal quotation and citation omitted), affirmed in part, reversed in part, ARB No. 07-079, slip op. at 10-11 (ARB Mar. 30, 2009).

Metro-North objects to the imposition of punitive damages here because it believes that any violation of the law occurred only eleven days after the effective date of the statute (T. 31). That is not true. Sub-section (a) of the FRSA went into effect in August of 2007, nearly a year before Mr. Santiago presented to OHS with an occupational injury. As we have consistently argued herein, the right to report work-related personal injuries promulgated in 2007 prohibits Metro-North's conduct here. Thus the effective date of the 2008 amendment is not relevant to the reprehensibility of Metro-North's conduct. Metro-North is a major rail carrier in a heavily regulated industry. At least by August of 2007, and most likely before that time, Metro-North had notice that harassment and intimidation of rail employees injured at work was statutorily prohibited.

Yet, after the 2007 amendments to the FRSA, Metro-North did nothing to change the way it handles employees who report work-related personal injuries. Critically, the evidence at trial established that even as late as the fall of 2008, Metro-North management, fully aware of two amendments to the FRSA, did nothing to alter its medical staff's discriminatory practices. In particular, Metro-North Administrator for OHS, Angela Pitaro and her boss, Vice President of Human Resources, Greg Bradley testified unequivocally that they knew about the amendments to FRSA in late 2008 (T. 214, 536-538). And yet, neither Pitaro nor Bradley instructed the OHS staff not to "deny, delay or interfere with the medical treatment of an employee's treating physician" (T. 212-15; 536-538). Bradley and Pitaro testified that they had "informational" meetings to tell the OHS staff that "this is what's out there and that's it" (Tr. 538; see also 212-15). Testimony by the OHS medical staff, however, calls even this minimal attention to the FRSA into question. Dr. Hildebrand and John Ella both testified that no one at Metro-North ever informed them of the FRSA's provisions (T. 319-20; 358, 389). Indeed, Dr. Hildebrand, OHS

Medical Director, testified that since 2008, she has become "a little more familiar" with the statute but had never actually read it (T. 389).

Bradley explained: "[w]e did nothing different the day before or the day after. Everything we did prior to, we did the day after" (T. 540). That is just the problem. The passage of the new employee protection provisions should have signaled the need for significant changes to the practices of Metro-North's medical department. For one, as Metro-North's OHS Administrator Angela Pitaro admitted at trial, Metro-North's medical staff should always work in tandem with the employee's treating physician (T. 199-202). Specifically, she testified:

> from the beginning of the case [the OHS staff] should be speaking with the doctor. [The OHS staff] should not be calling the doctor when things are going to change. You should have a continuum, a rapport, a relationship with that doctor from the beginning of the case. And whatever discussions need to happen, both the peer or the doctors need to discuss it with one another on the continuum of the case.

(T. 202). And specifically, Pitaro confirmed that when a Metro-North employee has an occupational injury, is seen at OHS, and OHS thinks the occupational injury is no longer occupational but may be non-occupational, "OHS should always reach out to the employee's treating doctor and ask their opinion as to whether it is still occupational or not" (T. 199-200).

But the overwhelming evidence at trial demonstrates that this standard of conduct rarely occurs and did not occur in Mr. Santiago's case. Ms. Pitaro confirmed that while "[t]he rule is that [OHS] should [contact the treating physician], [she didn't] know if it always happens" (T. 200) (emphasis added). OHS medical staff confirmed that rarely if ever happens; neither John Ella nor Dr. Hildebrand regularly engage the treating physician, generally speaking or with respect to the important decision of whether to reclassify an occupational injury (T. 271, 275, 287, 342, 354-55, 388-89). And an OSHA analysis of ten instances from August 1, 2007 to

December 31, 2008 where Metro-North reclassified an occupational injury as non-occupational, supports that testimony (OSHA Ex. 20). In eight of the ten instances OSHA examined, there was no peer to peer conversation between OHS and the treating physician (T. 623-25, 647-48, 652-53; OSHA Ex. 20).[16]

Even as late as July 2009, under what the Metro-North Administrator for OHS described as an "enhance[ment]" to OHS case management procedures, Metro-North allows as a matter of policy, the "medical judgment of [sic] OHS provider and [the ODG/ACOEM]" to determine whether "the Occupational portion of the case is considered resolved" (T. 263; General Ex. 23). More precisely, these new guidelines set forth that:

> Based on th[e] clinical assessment of an injury, functional recovery is expected within a certain period of time. These assessments are supported by . . . [the ODG and ACOEM].
>
> If employees do not attain functional recovery within the time period expected based on [sic] best medical judgment of OHS provider and the [ODG and ACOEM], the Occupational portion of the case is considered resolved.

(General Ex. 23). After the initial assessment of the injury, the 2009 guidelines elaborate that cases are to be re-evaluated regularly and these evaluations should include "review of additional information of treating physicians such as" test results and office records (id.).

This "enhance[ment]" does nothing to address the FRSA; what this "enhance[ment]" does is codify as a matter of policy the deficiencies characteristic of OHS in 2008; it perpetuates a system where the "functional recovery [time] expected" according to two industry resources

[16] At trial, Metro-North Administrator Angela Pitaro noted that as of 2009 Metro-North had adopted a new policy (see General Ex. 23) that reflected her opinion that communications with the treating physician should occur in the normal course. But the policy itself as well as her testimony undercuts the efficacy of that policy. Her testimony is not supported by the document; nowhere in the document is communication with the treating physician emphasized. And in any event, Pitaro stated that she would consider Metro-North's so-called "reach-out requirement" satisfied "if a phone call is placed to the physician, [regardless of] whether . . . the physician ever actually communicates with the case manager or the OHS physician" (T. 264). This testimony underscores the fact that punitive damages are needed to deter future conduct.

dictates the resolution of an occupational injury, over and above case specific factors and the opinion of the treating physician (T. 263; General Ex. 23). Under this "enhance[ment]," Metro-North still allows this important decision to occur without regard to whether the treating physician agrees with Metro-North's assessment that the occupational injury is "considered resolved" (T. 263; General Ex. 23). The involvement of the treating physician is limited to notes and test results; the ultimate decision as to interpreting these notes rests with OHS, relying primarily on the ODG/ACOEM. What Mr. Santiago's case demonstrates is that Metro-North regularly substitutes the judgment of an unsupervised physician assistant for that of the employee's treating specialist. Even given the benefit of a second review by Metro-North's sole doctor, the contrast remains stark: the opinion of a doctor who never met Mr. Santiago overruled the specialist who regularly treated him—based on a mere review of his file.

Moreover, the weight of the evidence at trial suggests that two bad motives account for Metro-North's conduct. First, cost-savings: as a general principle, the medical staff confirmed at trial that it was aware that Metro-North is responsible for all of the medical care and pays for 100 percent of the treating doctor's medical treatment expenses so long as the injury is occupational (T. 275, 343-44). Likewise, the staff testified that it recognized the opposite to be true: when an injury is deemed non-occupational, Metro-North pays for none of the employee's medical expenses (id.). Thus, the medical staff knows that its decision to reclassify an injury results in great cost-saving, keeping the cost of OHS's service contract low—half a million dollars lower than its closest competitor (See T. 515; General Ex. 10). And the medical staff knows that its decision to reclassify puts the onus on the employee to find an alternate source of payment for any continued care (T. 277, 343-44). Yet, as this case demonstrates, it is far from certain that private insurance will assume responsibility for the care and both OHS and Metro-

North know that (T. 277, 554-55). There are many reasons a private insurance company might not cover the medical care, least of which is that private insurance generally does not pay for occupational injuries.[17] Knowing he was still experiencing pain, the Metro-North medical staff just looked the other way (T. 289, 358, 374).

Second, the fact that Metro-North habitually stops reporting lost work days to the FRA when OHS considers a persisting injury "resolved" suggests an additional motive for its actions: to underreport work-place injuries. Metro-North's Chief Safety Officer, Mark Campbell confirmed that when the Safety Department gets an MD-40 form from the OHS changing the injury classification from occupational to non-occupational, as a matter of course, Metro-North's safety department ends its tally of lost work days—regardless of the fact that the employee is still losing days and/or undergoing medical treatment for the injury[18] (T. 418, 439-40). This results in systemic underreporting of lost work days. OSHA's analysis of ten injury files where Metro-North reclassified an injury as non-occupational establishes the prevalence of this underreporting: in seven of ten cases between August 1, 2007 and December 31, 2008, Metro-North underreported to the FRA the number of days absent due to the injury symptoms (T. 625-27, 655; OSHA Ex. 20). This systemic underreporting distorts the safety data collected by the FRA by making reported injuries look less severe than they are, and is thus, in conflict with the Congressional purpose behind the FRSA. Curiously, while Campbell admitted running a

[17] In this case, Mr. Santiago found financing for his medical care—not through his private insurance, but through a credit card that he continues to pay to this day—totaling $16,520—nearly a year after the successful treatment. See infra at p. 5. Metro-North's conduct should not be excused, as Metro-North suggested at trial (T. 155-160), just because Mr. Santiago elected to finance his health care at his own expense and ultimately got the care he needed. To permit Metro-North's behavior would punish Mr. Santiago for getting the medical care he needed, the medical care recommended by his treating physician. Employees should not have to forgo medical treatment in order to vindicate their rights under the FRSA.

[18] In Mr. Santiago's case, Metro-North reported no lost work days to the FRA even though the hospital directed Mr. Santiago not to work for two days, the Saturday and Sunday following his accident (T. 416-17). The FRA requires Metro-North to report any calendar days an injured employee is unable to work, including any weekends or rest days (T. 416-18; General Ex. 44). Campbell confirmed that this resulted in underreporting two lost work days to the FRA (T. 417-18).

program in which inaccuracy is inevitable, he stressed the importance of accurate reporting for both internal and external purposes (T. 484-86). Both Metro-North and the FRA use lost day data to develop or enhance safety programs (id.).

Based on the totality of the circumstances, there can be just one conclusion: punitive damages are warranted. To declare an occupational injury to be non-occupational in the face of persisting symptoms and in the face of opposition from the treating physician is plainly violative of the statute; but at the same time to ignore the obvious and drastic consequences of that uninformed decision to the employee and the government evinces a state of mind that requires a strong deterrent. Because the evidence suggests Metro-North's motives in denying employees' proper health care are to keep costs down and artificially bolster its safety record, the Court should exercise the full extent of the statutory remedies available under the Act. Exemplary damages will send precisely the message that Congress intended when it amended the FRSA in 2007 to increase employee protection provisions (with the availability of punitive damages).

CONCLUSION

For the foregoing reasons, the Court should find Metro-North to have violated section (a)(4) of the FRSA when it reclassified Mr. Santiago's occupational injury as non-occupational and award both compensatory and punitive damages.

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